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M E M O R A N D U M

To: Center for Nonprofit Management (for Blog)

From: Christopher M. Was

Date: December 20, 2016

Subject: Tennessee Attorney General Opinion 16-41 (Issued December 6, 2016)

The Tennessee Attorney General recently issued an opinion dealing with lobbying activities under the Tennessee Charitable Solicitations Act, T.C.A. § 48-101-501, *et seq.* (the "Solicitations Act"). Op. No. 61-41 issued December 6, 2016. The opinion deals only with the Solicitations Act, and addresses two principal issues: (1) what constitutes activities that are for "charitable purposes" as that term is used in the Solicitations Act; and (2) whether lobbying governmental officials in either the legislative or executive branches constitutes a "charitable purpose" or a "noncharitable purpose."

The context in which these issues arise under the Solicitations Act is as follows: a charitable organization that is required to register under the Act may solicit funds from the public only for "charitable purposes" and may not spend funds solicited from the public for "noncharitable purposes." *See,* T.C.A. § 48-101-513(a). Thus a charitable organization may only expend solicited funds on lobbying activities that are for "charitable purposes."

At the outset, it should be noted that restrictions on lobbying by charitable organizations under the Solicitations Act are analytically distinct from the scope of lobbying activities permitted to be engaged in by exempt organizations under federal exempt organization tax law. If a charitable organization described in Federal Code Section 501(c)(3) engages in impermissible lobbying activities it risks losing its federal tax exempt status. While some of the issues overlap, the rules under the Solicitations Act and federal law, established for discrete purposes, differ in some respects. While an extended treatment of the rules under federal exempt organization tax law is beyond the scope of this discussion, some of those rules are summarized in Section 2 below.

1. Opinion No. 61-41

The Opinion does not provide definitive answers to either of the principal issues identified above. Rather, resolution of whether a specific activity is for a "charitable purpose" and whether lobbying by a charitable organization is in furtherance of a "charitable purpose" in a given case will depend upon application of an "all of the facts and circumstances" test. Nevertheless, the Opinion does provide some useful guidance for charitable organizations that intend to engage in lobbying.

As for the first question, the Opinion notes that neither "charitable purposes" nor "noncharitable purposes" is defined by the Solicitations Act or regulations issued by the Tennessee Secretary of State. The Opinion concludes that "'charitable purposes' are purposes substantially and materially related to and in furtherance of benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious, and eleemosynary activities." The Opinion accordingly reasons that " 'noncharitable purposes' are those purposes that are not 'charitable'." For purposes of fashioning a real world working definition, since most CNM members registering under the Solicitations Act will also be federally tax exempt organizations,

their "charitable purpose" will be defined by the core mission of the organization and the activities and basis on which federal exempt status was granted.

With respect to whether lobbying constitutes a charitable purpose, the Opinion notes that the Solicitations Act nowhere specifically addresses lobbying. The Opinion accordingly determines that to be permissible under the Solicitations Act, the lobbying activity must support the organization's charitable purpose. While resolution of the question in a given case will depend on application of a "facts and circumstances" test, the Opinion offers this guidance:

> For example, if a charitable organization advocates for or educates legislators on an issue related to its charitable mission, it may be engaged in a "charitable purpose." But if it advocates for issues that are beyond the scope of its charitable mission or engages in purely political activity, it may be engaged in a noncharitable purpose.

The Opinion also reflects that it will draw the line at participation in a political campaign in support of or in opposition of a candidate for office. That is, attempting to influence passage of legislation, or advocating for a particular result before executive branch officials, is permissible lobbying if tied to the organization's charitable mission and purposes. However, the Opinion distinguishes activities that support or oppose a candidate for public office – which seek "to influence *the voting public*" (emphasis added) – and therefore do not constitute permissible lobbying.

Accordingly, charitable organizations registered under the Act are advised:

(1) to confine lobbying activities to issues within the scope of their charitable mission and purpose(s); and

(2) not to participate in political campaigns in support of or in opposition to candidates for office.

2. Summary of Federal Exempt Organization Tax Law Restrictions on Lobbying

A. Participation in Political Campaigns of Candidates for Office is Prohibited Under Federal Law

Organizations exempt under Code Section 501(c)(3) are prohibited from directly or indirectly participating or intervening in any political campaign on behalf of (or in opposition to) any candidate for public office. The prohibition applies to all political campaigns, whether at the federal, state or local level. Violation of the prohibition may result in revocation of the organization's exempt status and imposition of certain excise taxes. The IRS has issued guidance that contributions to political campaign funds or to political action committees formed under Code Sec. 527 violate the prohibition. *See*, Rev. Ruling 2007-41; Fact Sheet-2006-17 issued February 2006. Further, exempt organizations may not issue statements of position (oral or written) in favor or in opposition to any candidate.

B. Permitted Activities – Lobbying Distinguished

Exempt organizations are permitted to engage in lobbying activities, as discussed below:

- Exempt organization may engage in activities to influence legislation by lobbying, provided that the lobbying activities *do not* constitute a *substantial part* of its activities. "Lobbying" is defined as the attempt to influence legislation under IRS regulations. Exempt organizations may engage in two discrete types of lobbying: (1) advocating the adoption or rejection of legislation by communications to the public, *i.e.*, "grass roots lobbying"; or (2) contacting members of a legislative body concerning legislation, *i.e.*, "direct lobbying."

- Excluded from the definition of lobbying is advocating action by the *executive branch* of government or independent regulatory agencies.[1] Thus, exempt organizations may contact and advocate positions before officials of the executive branch of state or federal government without limitation.

- Whether specific lobbying activities are a "substantial part" of an exempt organization's total activities depends upon application of a "facts and circumstances" test. Unless the safe harbor expenditure test is elected (discussed below), there is no simple rule to determine if the amount of lobbying activity is deemed substantial. Due to the uncertainty of the tests for determining whether legislative activities are substantial, exempt organizations should consider electing the expenditure tests for lobbying under Code Sec. 501(h).

- The expenditure test of Code Sec. 501(h) establishes more precise standards for determining whether an exempt organization's direct *and* grass roots lobbying activities are substantial. It establishes a specified amount that a particular entity can expend on lobbying without violating the "substantial part" test.

- The expenditure test utilizes a sliding scale of permissible lobbying expenditures within ranges based on a percentage of the exempt organization's exempt purpose expenditures. Expenditure amounts are calculated separately for "grass roots lobbying" and for total lobbying.

- In general, "grass roots lobbying" expenditures are limited to 25% of an exempt organization's exempt purpose expenditures.

- Limitations also apply to an exempt organization's spending on *total lobbying* on a sliding scale, as follows:

Percentage Limitations	**Of Exempt Purpose Expenditures**
20%	of first $500,000
15%	of the next $500,000
10%	of the next $500,000
5%	of exempt purpose expenditures > $1.5 million

However, the total amount spent for lobbying in any one year may not exceed $1,000,000.

[1] The Tennessee Attorney General Opinion appears to include communications with executive branch officials *within* the definition of lobbying under the Solicitations Act.